(2)

Supreme Court, U.S.
FILED
JAN 6 1995
OFFICE OF THE CLERK

No. 94-961

In The

Supreme Court of the United States

October Term, 1994

STATE OF DELAWARE,

Petitioner,

v.

ROBERT W. JACKSON, III,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

M. JANE BRADY
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division
Counsel of Record

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of
Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-2500

January 6, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Burke v. Vose, 847 F.Supp. 256 (D.R.I. 1993) 2

Grieco v. Meachum, 533 F.2d 713 (1st Cir.), *cert. denied sub nom. Cassesso v. Meachum*, 429 U.S. 858 (1976) 2

Maine v. Moulton, 474 U.S. 159 (1985) 1, 2, 3

Massiah v. United States, 377 U.S. 201 (1964) 1, 2, 3

Nix v. Whiteside, 475 U.S. 156 (1986) 2

People v. Vargos, 582 N.Y.S.2d 193 (N.Y. App. Div. 1992) 2

State v. Burke, 529 A.2d 621 (R.I. 1987) 2

United States v. Adipietro, 983 F.2d 1468 (8th Cir. 1993) 2

United States v. Baylin, 535 F.Supp. 1145 (D. Del.), *vacated*, 696 F.2d 1030 (3d Cir. 1982) 3

United States v. Jewel, 947 F.2d 224 (7th Cir. 1991) 4

United States v. Kidd, 12 F.3d 30 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1629 (1994) 2, 3

United States v. Melton, 970 F.2d 1328 (4th Cir. 1992) 3

United States v. Osborne, 931 F.2d 1139 (7th Cir. 1991) 3

United States v. Tejada, 956 F.2d 1256 (2d Cir.), *cert. denied*, 113 S.Ct. 124 (1992) 4

United States v. Torres, 926 F.2d 321 (3d Cir. 1991) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 3661 3

Del. Code Ann. tit. 11, § 4209(c)(1) (Repl. 1987) 4

COURT RULES

U.S. Sent. Guidelines § 3C1.1 (1994) 2

No. 94-961

In The

Supreme Court of the United States

October Term, 1994

STATE OF DELAWARE,

Petitioner,

v.

ROBERT W. JACKSON, III,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The Decision of the Delaware Supreme Court Directly Conflicts With Decisions of Other Federal and State Courts.

As detailed in the petition for certiorari, the state court's analysis of the Sixth Amendment right to counsel is inconsistent with this Court's teachings on the role of counsel. *See* Pet. for Cert. at 9-13. Respondent urges that the state court's reasoning follows the principles set out in *Massiah v. United States*, 377 U.S. 201 (1964) and *Maine v. Moulton*, 474 U.S. 159 (1985). Unlike the Delaware Supreme Court, however, other state and federal courts have held statements such as those made by respondent to be admissible, under the Sixth Amendment, in the

proceedings to which the right to counsel had otherwise attached. Following the decision in *Nix v. Whiteside*, 475 U.S. 156 (1986), those courts have recognized that the right to counsel articulated in *Massiah* and *Moulton* reaches only those situations in which counsel has a proper role. *United States v. Kidd*, 12 F.3d 30, 32-33 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1629 (1994); *Burke v. Vose*, 847 F.Supp. 256, 261-64 (D.R.I. 1993); *State v. Burke*, 529 A.2d 621, 623-26 (R.I. 1987). *See Grieco v. Meachum*, 533 F.2d 713, 717-18 (1st Cir.), *cert. denied sub nom. Cassesso v. Meachum*, 429 U.S. 858 (1976) (reaching same result before *Whiteside*, noting that if defense counsel had "been present, [the defendant] would have been advised to refrain – not because the statements would have shown a consciousness of guilt of complicity in [the victim's] murder, but because his statements, themselves, were the operative acts of a separate criminal offense."). *See also People v. Vargos*, 582 N.Y.S.2d 193, 194 (N.Y. App. Div. 1992) (evidence of witness tampering admissible at trial in absence of motion to suppress). The Sixth Amendment analysis by the Delaware Supreme Court cannot be reconciled with the analysis followed by the other state and federal courts that have addressed the identical question. Accordingly, review is necessary to resolve this conflict.

2. The Issue Presented In this Case Raises A Substantial Question About Sentencing Procedures In the State and Federal Courts.

Evidence such as that admitted in respondent's penalty hearing is little different from that used by federal judges to enhance a defendant's sentence under §3C1.1 of the United States Sentencing Guidelines. *E.g., United*

States v. Adipietro, 983 F.2d 1468, 1479-80 (8th Cir. 1993); *United States v. Melton*, 970 F.2d 1328, 1330-31 (4th Cir. 1992); *United States v. Osborne*, 931 F.2d 1139, 1151-54 (7th Cir. 1991). Under respondent's Sixth Amendment analysis, evidence of his plot to kill a prosecution witness would be inadmissible. To explain this difference, respondent points to the congressional command that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" for sentencing purposes. 18 U.S.C. §3661. In respondent's view, that statutory direction allows federal courts to consider " 'illegally obtained evidence' " in sentencing.[1] Respondent seems to suggest that evidence admissible in the federal courts, *Kidd*, 12 F.3d at 32-33, is inadmissible in capital penalty hearings. Thus, according to respondent, the Sixth Amendment principles of *Massiah* and *Moulton* apply to capital penalty hearings, but Congress has abrogated that rule in federal criminal cases.

That proposition verges on the absurd: respondent cannot seriously suggest that the Sixth Amendment does not apply to federal sentencing proceedings. Indeed, the implication of the decision of the Fourth Circuit in *Kidd* is that *Massiah* and *Moulton* do apply. In addition, if respondent correctly views section 3661 as having repealed the Sixth Amendment for sentencing purposes in federal courts, then the corresponding language in the Delaware

---

[1] Brf. in Opp. at 7 (quoting *United States v. Baylin*, 535 F.Supp. 1145, 1151 (D. Del.), *vacated*, 696 F.2d 1030 (3d Cir. 1982)).

capital punishment statute[2] would surely authorize the use of his statements at his penalty hearing. However, respondent has simply read section 3661 too broadly. Though the courts of appeals have decided that section 3661 allows the use of evidence seized in violation of the Fourth Amendment, *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir.), *cert. denied*, 113 S.Ct. 124 (1992) (collecting cases), there is no apparent support for respondent's belief that illegally obtained confessions may be introduced under section 3661. *See United States v. Torres*, 926 F.2d 321, 322-23 (3d Cir. 1991). *Cf. United States v. Jewel*, 947 F.2d 224, 238-40 (7th Cir. 1991) (Easterbrook, J., concurring) (questioning scope of section 3661). It cannot be the case that federal prosecutors may use evidence such as the statements made by respondent, but state prosecutors cannot do so. Review is necessary in this case to correct the incongruity in sentencing procedures created by the Delaware Supreme Court.

---

[2] "At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance. . . . " Del. Code Ann. tit. 11, §4209(c)(1) (Repl. 1987).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment of the Delaware Supreme Court should be summarily reversed.

Respectfully Submitted,

M. JANE BRADY
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division
Counsel of Record

LOREN C. MEYERS
Deputy Attorney General

Delaware Department of
Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-2500

January 6, 1995